Filed 12/10/98

CERTIFIED FOR PARTIAL PUBLICATION*

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

SCHAEFER'S AMBULANCE SERVICE, Plaintiff and Appellant, v. COUNTY OF SAN BERNARDINO, Defendant and Respondent.	E021854 (Super.Ct.No. SCV-16421) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Martin A. Hildreth, Judge. (Retired judge of the San Bernardino Municipal Court, West Valley Division, assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Michael Leight and John Gloger for Plaintiff and Appellant.

Alan K. Marks, County Counsel, and Alan L. Green, Deputy County Counsel, for Defendant and Respondent.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts IV and V.

The Emergency Medical Services System and the Prehospital Emergency Medical Care Personnel Act (the EMS Act, or the Act) (Health & Saf. Code, § 1797 et seq.) allows a county to create exclusive operating areas for emergency ambulance services. In 1985, the County of San Bernardino (County) created 15 exclusive operating areas and assigned two of them to both Schaefer's Ambulance Service (Schaefer) and a second ambulance company. At the time, Schaefer was providing ambulance services at the basic life support level; the other company was providing ambulance services at the advanced life support level.

Schaefer filed this action for injunctive and declaratory relief, in which it asserts a right to begin providing advanced life support in these two exclusive operating areas without the County's permission. It also asserts a right to carry patients from one medical facility to another, both inside and outside its exclusive operating areas, without the County's permission. The trial court ruled Schaefer had no such rights. We will affirm.

I

THE STATUTORY SCHEME

"'[T]he EMS Act . . . create[s] a comprehensive system governing virtually every aspect of prehospital emergency medical services.'" (*Valley Medical Transport, Inc.* v. *Apple Valley Fire Protection Dist.* (1998) 17 Cal.4th 747, 754, quoting *County of San Bernardino* v. *City of San Bernardino* (1997) 15 Cal.4th 909, 915.)

The Act defines "emergency medical services" as "the services utilized in responding to a medical emergency." (Health & Saf. Code, § 1797.72.) "Emergency," in

turn, is defined as "a condition or situation in which an individual has a need for immediate medical attention, or where the potential for such need is perceived by emergency medical personnel or a public safety agency." (Health & Saf. Code, § 1797.70.)

"Emergency medical services," as contemplated in the Act, consist of "basic life support," administered by an "Emergency Medical Technician-I"; "limited advanced life support," administered by an "Emergency Medical Technician-II"; and "advanced life support," administered by an "Emergency Medical Technician-Paramedic." (Health & Saf. Code, §§ 1797.52, 1797.60, 1797.80, 1797.82, 1797.84, 1797.92.)

"Basic life support" is defined as "emergency first aid and cardiopulmonary resuscitation procedures . . . ." (Health & Saf. Code, § 1797.60.) "Advanced life support" is defined as "special services designed to provide definitive prehospital emergency medical care, including, but not limited to, cardiopulmonary resuscitation, cardiac monitoring, cardiac defibrillation, advanced airway management, intravenous therapy, administration of specified drugs and other medicinal preparations, and other specified techniques and procedures administered . . . at the scene of an emergency, during transport to an acute care hospital, during interfacility transfer, and while in the emergency department of an acute care hospital until responsibility is assumed by the emergency or other medical staff of that hospital." (Health & Saf. Code, § 1797.52.)

The Act provides: "Each county may develop an emergency medical services program. Each county developing such a program shall designate a local EMS agency

. . . ." (Health & Saf. Code, § 1797.200.) The duties of a local EMS agency include creating an emergency medical services plan (Health & Saf. Code, §§ 1797.76, 1797.204, 1797.250), "coordinat[ing] and otherwise facilitat[ing]" the development of an emergency medical services system (Health & Saf. Code, § 1797.252), and implementing advanced life support systems (Health & Saf. Code, § 1797.206). Any organization which provides advanced life support must be an authorized part of the local EMS agency's emergency medical services system. (Health & Saf. Code, § 1797.178.)

As part of its emergency medical services plan, a local EMS agency may create exclusive operating areas for "emergency ambulance services or providers of limited advanced life support or advanced life support." (Health & Saf. Code, §§ 1797.85, 1797.224.) Ordinarily, it must assign exclusive operating areas to providers by means of a "competitive process." However, if it assigns an exclusive operating area to a provider which is already operating in that area "in the manner and scope in which the services have been provided without interruption since January 1, 1981," it need not use a competitive process. (Health & Saf. Code, § 1797.224.)

II

FACTUAL BACKGROUND

On June 18, 1985, the County[1] adopted the transportation element of its emergency medical services plan (the Transportation Plan). The Transportation Plan

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[1] We see no need to distinguish in this opinion between the County and the County's local EMS agency. When the Transportation Plan was first drafted, the

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divided the County into 15 exclusive operating areas. Area 1 was roughly equivalent to Upland and the western portion of Rancho Cucamonga. Area 2 was roughly equivalent to Montclair and Chino.

The Transportation Plan declared Area 1 an exclusive operating area to be awarded by competitive process. However, pending the selection of a provider by competitive process, it assigned Area 1 to Schaefer, Mercy,[2] and Canyon Medical Services.

With respect to Area 2, the Transportation Plan declared: "[S]ervices have been provided by the same provider . . . in the same manner and scope without interruption since January 1, 1981 and . . . it is in the best interests of this plan and the citizens of the area[] to be served to continue providing these services through the same providers." It therefore designated Area 2 a non-competitive exclusive operating area. It assigned Area 2 to Schaefer and Mercy.

[footnote continued from previous page]
County's local EMS agency was the Inland Counties Emergency Medical Agency (ICEMA). However, the County's Board of Supervisors was also the governing body of ICEMA. For this reason, the Supreme Court has treated the County and ICEMA as interchangeable for purposes of the EMS Act. (*Valley Medical Transport, Inc.* v. *Apple Valley Fire Protection Dist.*, *supra*, 17 Cal.4th at p. 751, fn. 2; *County of San Bernardino* v. *City of San Bernardino*, *supra*, 15 Cal.4th at p. 921, fn. 1.) Moreover, the evidence at trial indicated that ICEMA has been succeeded by the San Bernardino County EMS Agency, which is part of the County's Department of Public Health.

2 Through a series of corporate acquisitions, Schaefer's main competitor in Areas 1 and 2 has been known from time to time as TransMedical, Inc., Mercy Ambulance, Inc., Careline and American Medical Response. For the sake of consistency, we will refer to them all as "Mercy."

III

STANDARD OF REVIEW

This case comes to us following a bench trial on the merits. We review any issues of statutory construction de novo. (*Burden* v. *Snowden* (1992) 2 Cal.4th 556, 562; *Committee for Responsible Planning* v. *City of Indian Wells* (1989) 209 Cal.App.3d 1005, 1010; see Evid. Code § 310, subd. (a).) In reviewing any other issues as to the construction of a written instrument, to the extent the evidence is in conflict, we accept the trial court's implied credibility determinations; to the extent the evidence is not in conflict, we construe the instrument, and we resolve any conflicting inferences, ourselves. (*Parsons* v. *Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866 and 866, fn. 2.) The evidence pertaining to the construction of the Transportation Plan is not in conflict. Accordingly, we need not decide which of these two standards applies to the construction of the Transportation Plan; either way, we may construe it de novo.

In reviewing any other issues, the substantial evidence rule applies. That is, "we look at the evidence in support of the successful party, disregarding the contrary showing. [Citations.] All conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. [Citations.]" (*Munoz* v. *Olin* (1979) 24 Cal.3d 629, 635-636.)

IV

THE EVIDENTIARY BASIS FOR THE COUNTY'S REFUSAL TO ALLOW SCHAEFER TO PROVIDE ADVANCED LIFE SUPPORT

Schaefer contends the County's refusal to allow it to upgrade from basic life support to advanced life support was unsupported by substantial evidence, arbitrary, and in violation of due process.

It is not entirely clear whether Schaefer is arguing due process required the County to hold a hearing. Schaefer does argue — at some length — the County's action implicates Schaefer's fundamental right to practice its profession. Schaefer also quotes *Endler* v. *Schutzbank* (1968) 68 Cal.2d 162, 172 to the effect that: "Procedural due process requires notice, confrontation, and a full hearing whenever action by the state significantly impairs an individual's freedom to pursue a private occupation." The only apparent point of this argument is to show that Schaefer was entitled to notice and a hearing.

In the trial court, however, Schaefer never argued due process required the County to hold a hearing. Indeed, Schaefer never asserted any violation of due process. "It is the general rule applicable in civil cases that a constitutional question must be raised at the earliest opportunity or it will be considered as waived. [Citations.]" (*Geftakys* v. *State Personnel Board* (1982) 138 Cal.App.3d 844, 864 [failure to raise due process contention in trial court]; accord *Hepner* v. *Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486.)

Schaefer *did* argue below that the County did not have a sufficient evidentiary basis to support its denial of Schaefer's application and that it failed to perform a sufficient investigation. Schaefer renews these arguments on appeal.

A. *Additional Factual Background*.

As of January 1, 1981, Schaefer was providing ambulance services at the basic life support level. After the Transportation Plan was adopted, the County issued Schaefer an ambulance permit authorizing it to provide only basic life support. It issued Mercy an ambulance permit authorizing it to provide advanced life support.

On May 24, 1993, Schaefer applied to renew its ambulance permit. In the application, it indicated it intended to upgrade four of its ambulances to the advanced life support level. In the section of the application labeled "Statement of Need," Schaefer stated: "Cole-Schaefer Ambulance has been serving the area for approximately 60 years and has built up a clientel [*sic*]. We also have approximately 25 contracts with HMO providers with clients residing in the County. We also provide Special Care Transport. We have been requested by a number of agencys [*sic*] to be licensed in the County for paramedics for first in response also backup."

On January 31, 1994, the County denied Schaefer's application to the extent it sought to upgrade to advanced life support. It explained: "Mercy Ambulance has been providing advanced life support service . . . in exclusive operating Areas 1 and 2 without interruption since at least 1981. Your request has failed to demonstrate that Mercy Ambulance has violated the provisions of the EMS transportation plan or the county

ambulance ordinance. Your request would constitute an infringement of the existing provisions of the EMS transportation plan and county ordinance."

The County has a quality assurance program. It keeps a record of every paramedic run, and it reviews these records on a regular basis. Diane Fisher, the administrator of the County's local EMS agency, testified she would be aware of any major problem with a provider's quality of service. She was not aware of any problems with Mercy. The medical director of the County's local EMS agency testified that from time to time he had become aware of problems with a provider's quality of service, but he was not aware of any problems with Mercy.

It was Diane Fisher who denied Schaefer's upgrade request. She relied on the recommendation of a staff analyst, Linda Hardy. Hardy had reviewed the Transportation Plan, the County's ambulance ordinance, and the County's files on Schaefer and Mercy. It was Hardy's understanding that, under the Transportation Plan, the existing basic life support provider in an area was to continue providing basic life support; the existing advanced life support provider in an area was to continue providing advanced life support. She discussed her understanding of the Transportation Plan with Fisher, who agreed with it.

B. *Analysis.*

The County contends it could properly deny Schaefer's upgrade request without any investigation because Schaefer's permit application failed to show a need for an additional advanced life support provider. By analogy, if a trial court decides a plaintiff's

complaint has failed to state a cause of action, it can sustain a demurrer and eventually enter judgment; it need not hold an evidentiary hearing. Alternatively, the County also contends it could properly deny Schaefer's request without any investigation because County officials had personal knowledge that Mercy was providing satisfactory advanced life support services.

The problem with these dual contentions is that the County did not actually deny the request based on lack of need. At the time, the County stated it was denying the request because: "Your request has failed to demonstrate that Mercy Ambulance has violated the provisions of the EMS transportation plan or the county ambulance ordinance. Your request would constitute an infringement of the existing provisions of the EMS transportation plan and county ordinance." Diane Fisher confirmed that these were the County's only reasons for denying Schaefer's request.

Moreover, we do not believe the County could have denied Schaefer's request based solely on lack of need. Under the applicable San Bernardino County ordinances (collectively the Ambulance Ordinance), it is unlawful to operate an ambulance service without a permit. (S.B. Co. Ord., § 31.082, subd. (a).) An application for a permit must state, among other things, what level(s) of service the applicant proposes to provide. The resulting permit must specify whether the permittee can provide basic life support, advanced life support, or both. (S.B. Co. Ord., §§ 31.081, subd. (q), 31.084, subd. (a)(8), 31.087.)

An initial permit application, or a permit application which proposes a substantial change in the content of the permit, must include a "statement . . . that shows to the satisfaction of the Department that issuance of a permit is in the public interest and there is a need for a permit to be issued, in that there is a requirement for ambulance service which can be legally serviced by the applicant." (S.B. Co. Ord., §§ 31.084, subd. (a)(15), 31.089.) We may assume, without deciding, a permit could be denied if the statement of need were wholly missing or otherwise not in compliance with the Ambulance Ordinance. However, *as to an exclusive operating area*, we do not believe the provider assigned to that area in the Transportation Plan could be denied a permit based on lack of need.

In acting on an application for a permit to operate in a nonexclusive operating area, the Health Officer must "conduct an investigation to determine if the public health, safety, welfare, convenience, and necessity require the granting of a[] . . . permit" and "if the applicant meets all requirements of [the Ambulance Ordinance]." (S.B. Co. Ord., § 31.085, subd. (a).) Moreover, before such a permit may issue, the Board of Supervisors must find that "the applicant has demonstrated that the public health, safety, welfare, convenience, and necessity require the availability of such ambulance service and that the applicant meets all requirements of [the Ambulance Ordinance]." (S.B. Co. Ord., § 31.086, subd. (a).)

As to exclusive operating areas, however, there are no similar provisions. The Ambulance Ordinance merely states: "The Board may . . . order the issuance of a permit

for an exclusive operating area to a provider selected by the process as described in the EMS Plan . . . ." (S.B. Co. Ord., § 31.086, subd. (a).) Thus, the Ambulance Ordinance implicitly deems the Transportation Plan's assignment of an exclusive operating area to a particular provider to be a sufficient indication of a need for that provider's services. Presumably, lack of need would be a reason to amend the Transportation Plan. However, absent such an amendment, it does not appear the County could deny a permit for a designated provider to operate in its own exclusive operating area based on lack of need.

The County's denial of Schaefer's upgrade request was based on its interpretation of the Transportation Plan. Admittedly, the Transportation Plan did not specifically refer to either basic life support or advanced life support. The responsible County officials, however, determined that, when the Transportation Plan assigned an exclusive operating area to two providers, one which had historically provided basic life support and another which had historically provided advanced life support, it intended to make each the exclusive provider of its own existing level of services in that exclusive operating area.

Under this view, there was nothing for the County to investigate. Unless there was some reason to revoke Mercy's exclusive authorization to provide advanced life support, authorizing Schaefer to provide advanced life support would violate the Transportation Plan. Schaefer's application did not suggest there was any reason to revoke Mercy's authorization. Under the Transportation Plan, the only way to terminate Mercy's exclusive authorization was to follow a quasi-judicial process which required specific allegations of good cause, notice to Mercy, and an opportunity for Mercy to respond.

Another provider's request to provide advanced life support would not trigger this process.

Schaefer argues the County had no evidence that permitting Schaefer to compete with Mercy would injure Mercy financially or would adversely affect Mercy's ability to deliver ambulance services. It complains that the County performed no investigation of Mercy's financial condition and "never consulted an economist or other financial expert about the financial viability of ambulance companies."

But this is not a challenge to the denial of Schaefer's upgrade request; it is a challenge to the Transportation Plan itself. The Transportation Plan constituted a legislative determination that exclusive operating areas would benefit the general public. The Transportation Plan declared: "To ensure the effectiveness and success of an EMS plan or EMS system, it is necessary to ensure the availability of qualified, competent, well-managed and financially sound emergency transportation providers. This can best be assured . . . by establishment of exclusive operating areas . . . ."

In making this determination, the County was exercising law-making authority delegated to it by the Legislature. (See *City of Lafayette* v. *County of Contra Costa* (1979) 91 Cal.App.3d 749, 754.) The County therefore was not required to hold any hearings or to take any evidence. (*Horn* v. *County of Ventura* (1979) 24 Cal.3d 605, 612-613; *California Gillnetters Assn.* v. *Department of Fish & Game* (1995) 39 Cal.App.4th 1145, 1160.) The Transportation Plan is not subject to challenge unless it is arbitrary, capricious, or in conflict with higher law. (*International Brotherhood of Electrical*

Workers v. *Aubry* (1996) 41 Cal.App.4th 1632, 1636; *Harriman* v. *City of Beverly Hills* (1969) 275 Cal.App.2d 918, 925.)

Once the responsible County officials concluded Schaefer's upgrade request violated the Transportation Plan, they could reasonably conclude it also violated the underlying purposes of the Transportation Plan. That is, they could reasonably conclude that granting the request would injure Mercy financially, threaten Mercy's ability to provide emergency ambulance services, and/or imperil the provision of emergency ambulance services in the County. They did not have to investigate or take evidence to confirm that this was really true. Even if it was not true — even if Mercy and Schaefer could comfortably coexist — the Transportation Plan controlled.

If the County's construction of the Transportation Plan was correct, the Transportation Plan itself required the County to deny Schaefer's request. We now turn to this question.

V

THE COUNTY'S AUTHORITY TO REFUSE TO ALLOW SCHAEFER TO PROVIDE ADVANCED LIFE SUPPORT SERVICES

Schaefer contends the County had no authority to deny its request to upgrade to advanced life support. Schaefer argues that, under the EMS Act, the County can regulate levels of service only via the Transportation Plan, and the Transportation Plan is silent with respect to levels of service. Although the Transportation Plan does not refer to basic

life support and advanced life support in so many words, we disagree with Schaefer's conclusion.

Under the EMS Act, the County had to assign each exclusive operating area by a competitive process. It could bypass this requirement only if it "continue[d] the use of existing providers operating within a local EMS area in the manner and scope in which the services have been provided without interruption since January 1, 1981." (Health & Saf. Code, § 1797.224.) The Transportation Plan assigned Area 2 to Schaefer and Mercy because they had been providing services in Area 2 "in the same manner and scope without interruption since January 1, 1981 . . . ." It assigned Area 1 to Schaefer and Mercy because, although they had not been providing services there continuously since January 1, 1981, they were at least "currently providing services in such area . . . ."

As the responsible County officials construed the Transportation Plan, this meant Schaefer and Mercy each became the exclusive provider of whatever "manner and scope" of services it was already providing. Thus, Schaefer became the exclusive provider of basic life support, and Mercy became the exclusive provider of advanced life support. "An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts . . . ." (*Yamaha Corporation of America* v. *State Board of Equalization* (1998) 19 Cal.4th 1, 7.) Such an interpretation is entitled to greater weight when "'the agency has a comparative interpretive advantage over the courts,'" such as when "'the agency has expertise and technical knowledge,'" or when dealing with "'an agency's interpretation of its own regulation.'" (*Id.*, at p. 12, quoting

Cal. Law Revision Com., Tent. Recommendation, Judicial Review of Agency Action (Aug. 1995) p. 11.) Here, the County's own experts on emergency medical services were interpreting the County's own Transportation Plan. We agree with this interpretation.

Schaefer argues the County has not consistently followed its own interpretation. It points to the fact that on January 15, 1986, after the adoption of the Transportation Plan, the County sent Mercy a letter authorizing it to provide advanced life support. It concludes the County did not really believe the Transportation Plan precluded Mercy from upgrading from basic life support to advanced life support.

Schaefer's reasoning depends on an unproven premise — that Mercy was not already providing advanced life support. The record shows that, in fact, Mercy was providing advanced life support even before January 15, 1986. The County's letter appears to have been triggered by the adoption of former California Code of Regulations, title 22, section 100161. (See now Cal. Code Regs., tit. 22, § 100168.) It required local EMS agencies to establish policies and procedures for the approval and evaluation of all providers of advanced life support. In its letter, the County stated it was giving Mercy approval to provide advanced life support as "an interim measure to assure compliance with Title 22." Thus, the letter is not evidence that Mercy was not already providing advanced life support.[3]

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3 At oral argument, Schaefer argued there was no evidence that Mercy was providing advanced life support as of January 1, 1981. This was fairly inferable, however, from the fact that Mercy had begun providing advanced life support some time before the Transportation Plan was adopted, and that the Transportation Plan included a

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Schaefer also relies on the Supreme Court's two decisions interpreting the EMS Act, *Valley Medical Transport, Inc.* v. *Apple Valley Fire Protection Dist., supra*, 17 Cal.4th 747 and *County of San Bernardino* v. *City of San Bernardino, supra*, 15 Cal.4th 909. Both cases, however, were construing Health and Safety Code section 1797.201, which gives a city or fire district which was providing emergency medical services as of June 1, 1980, a qualified right to continue to provide such services.[4] They held a "grandfathered" city or fire district can increase or decrease the level of emergency medical services it was providing as of June 1, 1980, but cannot change the type of emergency medical services it was providing. (*Valley Medical Transport, Inc.* v. *Apple Valley Fire Protection Dist., supra*, at pp. 757-760; *County of San Bernardino* v. *City of*

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finding that Mercy had been providing services in the same manner and scope since January 1, 1981. This also was fairly inferable from the fact that the providers as of January 1, 1981, were Schaefer and Mercy, and that Schaefer was providing only basic life support.

In any event, the County did not have the burden of proving its finding that Mercy had been providing advanced life support since January 1, 1981, was correct; it was Schaefer's burden to prove it was incorrect. This Schaefer failed to do.

4 Health and Safety Code section 1797.201 provides, as pertinent here:

"Upon the request of a city or fire district that contracted for or provided, as of June 1, 1980, prehospital emergency medical services, a county shall enter into a written agreement with the city or fire district regarding the provision of prehospital emergency medical services for that city or fire district. Until such time that an agreement is reached, prehospital emergency medical services shall be continued at not less than the existing level, and the administration of prehospital EMS by cities and fire districts presently providing such services shall be retained by those cities and fire districts, except the level of prehospital EMS may be reduced where the city council, or the governing body of a fire district, pursuant to a public hearing, determines that the reduction is necessary."

San Bernardino, *supra*, at pp. 929-934.) They reasoned that Health and Safety Code section 1797.201 gives such cities and fire districts the right to "retain" the "administration" of the emergency medical services they were providing as of the cutoff date. (*Valley Medical Transport, Inc.* v. *Apple Valley Fire Protection Dist.*, *supra*, at pp. 755-758; *County of San Bernardino* v. *City of San Bernardino*, *supra*, at pp. 929-934.)

Health and Safety Code section 1797.201 does not apply here. Schaefer argues, however, the same principles should govern under Health and Safety Code section 1797.224. Both sections, Schaefer argues, allow existing providers to be "grandfathered." Under Health and Safety Code section 1797.201, a "grandfathered" city or fire district is free to increase its level of services. Accordingly, under Health and Safety Code section 1797.224, a "grandfathered" private provider should be equally free to increase its level of services.

Health and Safety Code section 1797.201, however, expressly states that a grandfathered city or fire district shall "retain" the "administration" of emergency medical services. It also states that a grandfathered city or fire district must continue to provide services "at not less than the existing level," thus at least implying the city or fire district is free to increase its level of services.

Health and Safety Code section 1797.224, by contrast, contains no similar language. To the contrary, it allows a private provider to be grandfathered if and only if it has been providing the same "manner and scope" of services without interruption since

January 1, 1981. Regardless of whether this language, standing alone, would limit a grandfathered provider to providing the same "manner and scope" of services, it cannot be said that the County, by limiting Schaefer to providing the same manner and scope of services, has somehow violated the EMS Act.

We conclude the County properly refused to allow Schaefer to provide advanced life support.

VI

THE COUNTY'S AUTHORITY TO ESTABLISH EXCLUSIVE OPERATING AREAS FOR AMBULANCES PERFORMING INTERFACILITY TRANSFERS

Schaefer contends the County lacked the authority to prohibit it from providing interfacility transfers outside its designated exclusive operating areas.

A. *Additional Factual Background*.

Schaefer has entered into, and seeks to continue to enter into, contracts with various health maintenance organizations (HMO's) throughout the County to provide interfacility transfers. Interfacility transfers involve the transportation of a patient from one health care facility — a doctor's office, a nursing home, a hospital, or a hospice — to another. According to Schaefer, they also include the transportation of a patient from a health facility to his or her home, or vice versa, in the absence of a medical emergency. In order to perform these contracts, Schaefer must be able to pick up patients outside, as well as inside, its exclusive operating area.

On May 2, 1994, the County notified Schaefer that, by transporting patients from a convalescent home outside its exclusive operating area, it had violated the Transportation Plan. It explained: "You . . . contend that the transports . . . were 'non-emergency transports' and outside the scope and authority of the County's Plan. The County's EMS Plan defines 'emergency medical services' to comprehend not only the provision of medical services when an individual has a need for immediate medical attention, but also where there may be potential for such need either in case of an accident or injury or in the case of an interfacility transfer or transport. It seems unlikely that a convalescent home would request ambulance transport if in fact the potential for immediate medical attention was not first determined by the appropriate personnel. Individuals not in need or in potential need of immediate medical attention would not require ambulance transport but rather should be transported utilizing other modes of transport, i.e., wheelchair vans, guerney [*sic*] vans, etc." The County directed Schaefer to "cease and desist providing ambulance service within San Bernardino County outside of permitted exclusive operating Areas 1 and 2."

Schaefer contends all interfacility transfers constitute nonemergency ambulance services. James McNeal, Schaefer's president, opined that a medical emergency arises during "[m]aybe one-10th of one percent" of all interfacility transfers. However, he agreed that, for interfacility transfers, it is "preferable" to use an ambulance equipped for basic life support, and it "could be" even "more preferable" to use an ambulance equipped for advanced life support. He testified the person who decides whether to use

an ambulance for an interfacility transfer, rather than, say, a taxicab, is usually the HMO caseworker.

The County, however, contends all interfacility transfers involving an emergency ambulance — i.e., an ambulance staffed and equipped to provide at least basic life support — constitute emergency ambulance services. Dr. Conrad Salinas, the medical director of the County's local EMS agency, testified ambulances are customarily used to make interfacility transfers. The person who decides whether to use an ambulance is usually the attending physician. In Dr. Salinas's experience, if a doctor requests an ambulance equipped to provide basic life support, "there is generally a medical justification for that." Every time he personally authorized an interfacility transfer, he considered it an emergency. In his view, there was no such thing as nonemergency interfacility transport.

B. *Analysis.*

The County more or less concedes that any authority it has to create exclusive operating areas derives from the EMS Act. The EMS Act expressly cloaks counties which create exclusive operating areas pursuant to the Act in state action immunity from federal antitrust law. (Health & Saf. Code, § 1797.6.) If the County attempted to create exclusive operating areas pursuant to its general police power rather than pursuant to the Act, presumably it would fall afoul of federal antitrust law. (See generally *Community Communications Co.* v. *Boulder* (1982) 455 U.S. 40, 48-52 [102 S.Ct. 835, 70 L.Ed.2d 810]; *County of San Bernardino* v. *City of San Bernardino*, *supra*, 15 Cal.4th at pp. 917-

918; *Memorial Hospitals Assn.* v. *Randol* (1995) 38 Cal.App.4th 1300, 1308-1309; *A-1 Ambulance Service, Inc.* v. *County of Monterey* (9th Cir. 1996) 90 F.3d 333, 335-337.)[5]

The Transportation Plan contains its own definition of "emergency medical services," which is essentially identical to the definition in the EMS Act, with the following italicized language added: "[T]he services needed to provide urgent medical care in a condition or situation in which an individual has a need for immediate medical attention or where the potential for such need is perceived by emergency medical personnel, a public safety agency, *or — with respect to interfacility transfers — qualified medical personnel of the transferring facility. Any transportation needs pursuant to a request for an emergency ambulance . . . shall be deemed the providing of emergency medical services*."

The County argues the EMS Act's permission to create exclusive operating areas for "emergency ambulance services" (Health & Saf. Code, § 1797.85) encompasses all services rendered by emergency ambulances; in other words, that "emergency" modifies "ambulance," not "services." We agree.

The EMS Act does not define "emergency ambulance services." It never uses this term outside of the exclusive operating area provisions. These provisions allow a local

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5 The County could not be held liable in damages. However, the exclusive operating areas could be enjoined. (15 U.S.C. §§ 34-36; *Crosby* v. *Hosp. Auth. of Valdosta & Lowndes County* (11th Cir. 1996) 93 F.3d 1515, 1533, cert. den. (1997) ___ U.S. ___ [117 S.Ct. 1246, 137 L.Ed.2d 328]; *Thatcher Enterprises* v. *Cache County Corp.* (10th Cir. 1990) 902 F.2d 1472, 1477.)

EMS agency to establish exclusive operating areas for "emergency ambulance services" and/or "providers of limited advanced life support or advanced life support." (Health & Saf. Code, § 1797.85.)

In *A-1 Ambulance Service, Inc.* v. *County of Monterey, supra*, 90 F.3d 333, the court held the exclusive operating area provisions applied to providers of advanced life support even when they were performing interfacility transfers. (*Id*., at pp. 334-337.) It explained: "A straightforward reading of §§ 1797.85 and 1797.224 leads us to the conclusion that the California Legislature intended to allow EMS agencies to create exclusive operating areas for: (1) emergency ambulance services; (2) providers of limited advanced life support; and (3) providers of advanced life support. [¶] On its face, therefore, the EMS Act appears to permit Monterey County to create exclusive operating areas for ALS ambulance service providers, even if the ALS ambulance service providers are engaged in non-emergency interfacility transfers." (*Id*., at p. 336.)

The court also noted that the definition of "advanced life support" in Health and Safety Code section 1797.52 "pertains to the level of service the ambulance provides during certain specified circumstances, including 'during interfacility transfer,' not the status of the patient that the ambulance transports. Therefore, even if an ambulance transports a patient who does not require emergency care, the ambulance is providing ALS service if it offers the 'special services designed to provide prehospital emergency medical care' and is engaged in one of the activities listed in § 1797.52." (*A-1 Ambulance Service, Inc.* v. *County of Monterey, supra*, 90 F.3d at p. 336.)

We believe that, just as the definition of "providers of advanced life support" turns on whether that level of service is available, and not on whether the particular patient actually needs that level of services, so does the definition of "emergency ambulance services." These terms are used in parallel, and they should be given a parallel construction. It would make little sense if exclusive operating areas for "providers of advanced life support" could restrict outsiders from performing interfacility transfers, but exclusive operating areas for "emergency ambulance services" could not.

Admittedly, the EMS Act in general is concerned with "emergency medical services," which are defined as medical services rendered during an actual or at least potential emergency. It is significant, however, that the exclusive operating area provisions eschew the term "emergency medical services" in favor of the terms "emergency ambulance services" and "providers of . . . advanced life support." We believe these provisions were intended to have broader scope.

The purpose of creating exclusive operating areas is to eliminate competition. "[T]he EMS Act 'evidences an intent to "displace unregulated competition" in a field where quality and cost control are vitally important state interests.' [Citation.]" (*County of San Bernardino* v. *City of San Bernardino*, *supra*, 15 Cal.4th at p. 932, quoting *Mercy-Peninsula Ambulance* v. *County of San Mateo* (N.D.Cal. 1984) 592 F.Supp. 956, 963.) "[A]n EOA permits local EMS agencies to offer private emergency service providers protection from competition in profitable, populous areas in exchange for the obligation

to serve unprofitable, more sparsely populated areas." (*Valley Medical Transport, Inc.* v. *Apple Valley Fire Protection Dist.*, *supra*, 17 Cal.4th at p. 759.)

The County asserts that most ambulance services use the income from interfacility transfers to subsidize more traditional emergency medical services. It stands to reason that providing interfacility transfers under contract to an HMO is a more stable and predictable source of income than responding to 911 calls from the general population; the poor and the uninsured presumably account for more than their proportionate share of the latter. If interfacility transfers were deemed nonemergency ambulance services, outside providers could invade an exclusive operating area and "cherry-pick" this income. This would interfere with the designated provider's ability to provide medical services in actual or potential emergencies. We believe that to prevent this, i.e., for prophylactic reasons, the drafters of the EMS Act empowered local EMS agencies to create exclusive operating areas for interfacility transfers.

In addition, we believe that carving interfacility transfers out from the exclusive operating area scheme would pose serious enforcement problems. The EMS Act does not support a blanket rule that interfacility transfers *never* constitute emergency ambulance services. The question of whether any given ambulance run violated the Transportation Plan would therefore require a particularized evaluation of the medical needs of the patient transported, and the services actually rendered to that patient. Who would make this determination? Schaefer? The County? The doctor or HMO caseworker who called for the ambulance? If the latter, how would this be documented? Would this

determination be made prospectively or in hindsight? If a patient Schaefer was transporting between medical facilities developed trouble breathing, would the "interfacility transfer" suddenly turn into "emergency ambulance services"? If so, would Schaefer have to stop transporting the patient? Once again, we believe the drafters of the EMS Act intended to provide a bright-line test for violations of an exclusive operating area, based on the nature of the ambulance providing the services.

Schaefer relies on an opinion of the Legislative Counsel. "While an opinion of the Legislative Counsel is entitled to respect, its weight depends on the reasons given in its support." (*Santa Clara County Local Transportation Authority* v. *Guardino* (1995) 11 Cal.4th 220, 238.) Apparently the opinion was written because a local EMS agency had designated one exclusive provider of ambulance services for a particular city. In doing so, the local EMS agency had purported to act pursuant to Health and Safety Code section 1797.106.[6] A hospital in the city wanted to contract with a nondesignated

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6 Health and Safety Code section 1797.106 provides:

"(a) Regulations, standards, and guidelines adopted by the authority and by local EMS agencies pursuant to the provisions of this division shall not prohibit hospitals which contract with group practice prepayment health care service plans from providing necessary medical services for the members of those plans.

"(b) Regulations, standards, and guidelines adopted by the authority and by local EMS agencies pursuant to the provisions of this division shall provide for the transport and transfer of a member of a group practice prepayment health care service plan to a hospital that contracts with the plan when the base hospital determines that the condition of the member permits the transport or when the condition of the member permits the transfer, except that when the dispatching agency determines that the transport by a transport unit would unreasonably remove the transport unit from the area, the member may be transported to the nearest hospital capable of treating the member."

ambulance service to transport members of a group practice prepayment health care service plan. A member of the Legislature asked the Legislative Counsel, "Does Section 1797.106 of the Health and Safety Code preclude a group practice prepayment health care service plan from contracting directly with a private ambulance company for transportation services for members of the plan?" (Ops. Cal. Legis. Counsel, No. 11402 (Aug. 7, 1985) p. 1.)

The Legislative Counsel concluded it did not. He reasoned: "The [EMS] Act is directed toward providing rapid medical services in emergency medical situations and does not authorize . . . local EMS agencies to regulate contracts by medical facilities for ambulance services in other situations. On the contrary, we construe Section 1797.106 as requiring that the regulations, standards, and guidelines adopted by . . . local EMS agencies interfere as little as possible with contracts between health care service plans and their members.

"In other words, subdivision (a) of Section 1797.106 specifies that regulations, standards, and guidelines shall not prohibit hospitals which contract with health care service plans from providing necessary medical services for the members of those plans. Subdivision (b) of the section then provides for transport or transfer of members of those plans who have been in emergency medical situations to hospitals where they are insured when such a move is feasible. The section does not authorize the preemption of the authority of a group practice prepayment health care service plan to contract with an ambulance company for services for members of the plan, generally, such as for the

transfer or transport of patients not admitted in emergency situations." (Ops. Cal. Legis. Counsel, No. 11402, *supra*, p. 4.)

This Legislative Counsel opinion is not particularly relevant here. It was premised exclusively on Health and Safety Code section 1797.106; it did not take into account a local EMS agency's authority to create exclusive operating areas pursuant to Health and Safety Code sections 1797.85 and 1797.224. We are inclined to agree with the Legislative Counsel that Health and Safety Code section 1797.106, standing alone, would not authorize a local EMS agency to establish an exclusive operating area. In this appeal, Schaefer does not purport to rely on Health and Safety Code section 1797.106; we therefore need not decide how this section interacts with sections 1797.85 and 1797.224.[7]

We conclude the Transportation Plan prohibits Schaefer from performing interfacility transfers outside its own exclusive operating areas.

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[7] Stooping to dictum, however, we note it is arguable that exclusive operating areas in no way prohibit a hospital from providing necessary medical services to members of a group practice prepayment health care service plan; they merely require the hospital to provide ambulance services via the designated provider(s).

It is also arguable that a local EMS agency's "plan" is not a "regulation, standard, or guideline" subject to the limitations of Health and Safety Code section 1797.106. This language may have been more narrowly aimed at overriding a local EMS agency's protocols for triage and transfer (Health & Saf. Code, § 1797.170) and its guidelines for transfer agreements between hospitals with varying levels of care (Health & Saf. Code, § 1797.172), but not its overall emergency medical services plan.

VII

DISPOSITION

The judgment is affirmed. The County shall recover costs on appeal against Schaefer.

CERTIFIED FOR PARTIAL PUBLICATION.

/s/ Richli
J.

We concur:

/s/ McKinster
Acting P.J.

/s/ Ward
J.